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UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

OFFICE OF GENERAL COUNSEL

August 13, 1981

In reply refer to:
B-203066

Major James W. Nall, USMC, Retired
4572 Via Marina, # 205
Marina del Rey, California 90291

Dear Major Nall:

This letter is in response to yours dated April 20, 1981, in which you request a decision of the Comptroller General concerning your [entitlement to active duty pay] for the period of 60 days prior to your retirement, during which time you were on leave from the Marine Corps and employed as a civilian by the Northrop Corporation.

According to your letter, you accepted an employment offer from Northrop in July 1980, and then you requested that your name be entered on the retired list of the United States Marine Corps on December 1, 1980. At the time, you had 60 days of accrued annual leave which you elected to use just prior to separation in order to begin your civilian employment 60 days prior to retirement. You further state that you knew of no statutory restrictions against such employment during this period of leave; that although your plans were fully known by staff members who were in a position to know of the restriction, none of them informed you of it; and, furthermore, that you had observed such civilian employment to be a common practice throughout your military career.

However, following your retirement you were informed by the Marine Corps Finance Center that 37 U.S.C. § 801(a) required your retired pay to be withheld until all payments made to you by the Marine Corps from September 24 through November 30, 1980, were recouped. You have specifically inquired whether this statute is intended to disbar a Regular Navy or Marine Corps officer from his pay entitlement if he is employed by an industrial concern, such as Northrop Corporation, during a period of leave just prior to retirement after he has been "relieved of his military duties, detached from his place of duty and unit, and for all practical purposes released from active duty."

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This is not a decision of the Comptroller General. However, the following may be of assistance to you in understanding the law in this area.

Under the provisions of 37 U.S.C. § 801(a) an officer of the Regular Navy or Regular Marine Corps, other than a retired officer, who is employed by a company which furnishes naval supplies or war materials to the United States is not entitled to any payment from the United States during that employment.

In applying 34 U.S.C. § 883 (July 22, 1935, 49 Stat. 490), as recodified in 10 U.S.C. § 6112 (August 6, 1956, 70A Stat. 381), the source statute of 37 U.S.C. § 801(a), we stated that the prohibition of the law is absolute with respect to an officer "on the active list" who is covered by the statute, even though he may not be on active duty. 33 Comp. Gen. 229 (1953). Accordingly, although you were on leave during the period for which your pay was recouped, you were on the active list. You were not a retired officer since your name had not yet been placed on the retired list. Therefore, you were bound by the restrictions of the statute, even though you may have been relieved of military duties.

You further state that there is no definition of "naval supplies and war materials," in the absence of which they "no longer exist in a modern sense" and, therefore, your employer was not engaged in selling them. However, in interpreting similar conflict-of-interest statutes restricting payment to military officers during employment of this nature, we concluded that "any article of tangible personal property purchased by the Department of Defense" is within the scope of the term "naval supplies and war materials." See 38 Comp. Gen. 470, 475 (1959).

While you may have acted in good faith or without knowledge of the law, this does not provide a legal basis for retention of pay received in violation of 37 U.S.C. § 801. See B-198751, February 19, 1981.

Concerning your contention that 37 U.S.C. § 801(a) discriminates against Regular Navy and Regular Marine Corps officers, it has been the consistent view of this Office that such matters are properly for consideration by the Congress rather than this Office.

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We trust the foregoing will be of assistance to you.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Edwin J. Monsma". The signature is written in black ink and is positioned above the typed name.

Edwin J. Monsma
Assistant General Counsel